# Asia Commercial Finance (M) Bhd v Regional Brilliance Sdn Bhd & Ors

HIGH COURT (MELAKA) — SUIT NO 1–22–141 OF 2000
LOW HOP BING J
9 SEPTEMBER 2005

*Civil Procedure — Service — Post, service by — Writ and statement of claim sent by AR registered post to last known business address as stated on guarantee — Whether defendant's letter of resignation constituted notice of change of address — Whether service was proper — Rules of the High Court 1980 O 10 r 1(1) — Interpretation Acts of 1948 and 1967 s 12*

The fifth defendant — a director of the first defendant company — had guaranteed a fixed loan facility granted by the plaintiff. Upon default of the loan, the plaintiff sent a writ and statement of claim ('the writ') by AR registered post to the fifth defendant at an address in Melaka ('the Melaka address'). When the fifth defendant did not entered appearance, the plaintiff obtained a judgment in default against him. The learned registrar dismissed the fifth defendant's application to set aside the judgment in default. The fifth defendant appealed.

The fifth defendant claimed that he was a permanent resident of Singapore and that the notice of demand had never been served on him. He also claimed that his letter of resignation dated 8 November 2000 containing his Singapore address constituted not only a notice to the plaintiff of the fifth defendant's change of address but also his release from any liability under the guarantee. The plaintiff contended that in the guarantee, the fifth defendant had given the Melaka address as the address for service and that the writ had been sent by AR registered post to the fifth defendant's Melaka address which was the last known business address of the fifth defendant in accordance with cl 22.2 of the guarantee and the AR card had been duly acknowledged and returned to the plaintiff.

**Held**, dismissing the appeal with costs:

(1) Clause 22.1 was self-explanatory. The notice of demand sent by the plaintiff to the fifth defendant's Melaka address was consistent with the address expressly stated in s 2 of the First Schedule to the guarantee, in which case the notice of demand shall be deemed, notwithstanding anything to the contrary, to be duly served when it ought, in due course of post or transmission, to have been delivered to the fifth defendant (see para 18).

(2) The plaintiff's service of the writ by sending it to the Melaka address as the last known business address of the fifth defendant had sufficiently fulfilled the prescribed mode of service under O 10 r 1(1) of the Rules of the High Court 1980 read together with s 12 of the Interpretation Acts of 1948 and 1967 (see para 28).

(3) The fifth defendant's letter of resignation did not constitute a notice of change of address nor did it release him from his liability as a guarantor, even assuming that he had already resigned as the first defendant's director, but the true position was that he had remained as a director of the first defendant (see para 40). In addition, under cl 1.1 of the guarantee, the fifth defendant had also agreed to pay all money or liability payable and remaining unpaid to the plaintiff by the borrower under and pursuant to the loan document (see para 47). The judgment which had been obtained against the first defendant as the borrower put beyond dispute the sum and the interest payable and remaining unpaid by the first defendant, for which the fifth defendant was liable under the guarantee (see para 48).

[**Bahasa Malaysia summary**

Defendan kelima — pengarah bagi syarikat defendan pertama — telah menjamin satu kemudahan pinjaman tetap yang diberikan oleh plaintif. Dengan kemungkiran pinjaman itu, plaintif telah menghantar satu writ dan penyata tuntutan ('writ tersebut') melalui pos berdaftar AR kepada defendan kelima kepada satu alamat di Melaka ('alamat Melaka tersebut'). Apabila defendan kelima tidak memasukkan kehadiran, plaintif telah memperoleh penghakiman ingkar terhadapnya. Pendaftar yang arif telah menolak permohonan defendan kelima untuk mengetepikan penghakiman ingkar tersebut. Defendan kelima merayu.

Defendan kelima mendakwa bahawa beliau adalah penduduk tetap Singapura dan notis tuntutan tidak pernah diserahkan kepadanya. Beliau juga mendakwa bahawa surat letak jawatan beliau bertarikh 8 November 2000 yang mengandungi alamat beliau di Singapura adalah merupakan bukan hanya notis kepada plaintif berkenaan pertukaran alamat defendan kelima, tetapi juga pelepasan beliau daripada sebarang liabiliti di bawah jaminan tersebut. Plaintif menyatakan bahawa dalam jaminan tersebut, defendan kelima telah memberi alamat Melaka sebagai alamat penyampaian dan writ telah dihantar melalui pos berdaftar AR kepada alamat Melaka defendan yang mana merupakan alamat perniagaan terakhir defendan kelima mengikut klausa 22.2 jaminan dan kad AR telah pun ditandatangani dan dipulangkan kepada plaintif.

**Diputuskan**, menolak rayuan dengan kos:

(1) Klausa 22.1 menerangkan maksudnya dengan sendiri. Notis tuntutan yang dihantar oleh plaintif kepada alamat Melaka defendan kelima adalah selaras dengan alamat yang dinyatakan dalam s 2 Jadual Pertama jaminan tersebut, yang mana, notis tuntutan adalah dianggap, tanpa mengira apa-apa di sebaliknya, sebagai diserahkan apabila ia patut, dalam masa pos kebiasaannya, telah diserahkan kepada defendan kelima (lihat perenggan 18).

(2) Penyampaian writ plaintif dengan cara menghantarnya ke alamat Melaka sebagai alamat perniagaan terakhir defendan kelima telah dengan secukupnya memenuhi cara penyampaian yang disenaraikan dalam A 10 k 1(1) Kaedah-kaedah Mahkamah Tinggi 1980 dibaca bersama s 12 Akta Tafsiran 1948 dan 1967 (lihat perenggan 28).

(3) Surat peletakan jawatan defendan kelima bukan merupakan notis pertukaran alamat dan ia juga tidak melepaskan beliau daripada liabiliti sebagai penjamin, walaupun dengan menganggap bahawa beliau sememangnya telah meletak jawatan sebagai pengarah defendan pertama, tetapi kedudukan sebenarnya adalah beliau masih tetap menjadi pengarah defendan pertama (lihat perenggan 40). Tambahan pula, di bawah klausa 1.1 jaminan tersebut, defendan kelima juga telah bersetuju untuk membayar kesemua wang atau liabiliti berbayar dan tertunggak kepada plaintif oleh peminjam di bawah dan menurut dokumen pinjaman (lihat perenggan 47). Penghakiman yang telah diperoleh terhadap defendan pertama sebagai peminjam telah meletakkan di luar pertikaian jumlah dan faedah berbayar dan tertunggak oleh defendan pertama, yang mana, defendan kelima adalah bertanggungjawab di bawah jaminan tersebut (lihat perenggan 48).]

**Notes**

For cases on service by post, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2188–2192.

**Cases referred to**

*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 (refd)
*Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 (refd)
*Hii King Chiong & Ors v Hii Yii Ann* [1996] MLJU 450 (refd)
*Kwong Yik Bank Bhd v Serlow Travels Sdn Bhd* [2000] 4 MLJ 595 (refd)
*MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 (refd)
*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (refd)
*Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67 (refd)
*Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 (refd)
*Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331 (refd)

**Legislation referred to**

Interpretation Acts of 1948 and 1967 s 12
Rules of the High Court 1980 O 10 r l(1)

*Mariah Madiah (WK Chan & Co) for the plaintiff.*
*Moi Teik Seng (Moi Teik Seng & Partners) for the fifth defendant.*

**Low Hop Bing J**:

APPEAL

**[1]** The learned registrar had on 16 January 2004 dismissed the summons in chambers in encl 85 filed by the fifth defendant ('D5') who had sought an order, *inter alia*, to set aside the judgment in default of appearance obtained by the plaintiff against D5.

**[2]** Enclosure 91 is D5's notice of appeal to me as judge in chambers.

FACTUAL BACKGROUND

**[3]** D5 was at the material time a director of the first defendant company ('Dl'). Pursuant to a letter of guarantee and indemnity dated 29 October 1996 ('the guarantee'), D5 is a guarantor in relation to a fixed loan facility of RM5 million granted by the plaintiff to D1.

**[4]** By reason of D1's default, summary judgment had been entered against D1 to D4 respectively on 4 March 2002. D1 had been wound up on 24 November 2004.

**[5]** D5 claimed that he is a permanent resident of Singapore and that he never had an address for service at D4–03, Plaza Jayamuda, Jalan Pelandok Putih, Off Jalan Ong Kim Wee, 75300 Melaka ('the Jalan Ong Kim Wee address').

**[6]** On 10 October 2000, D5 had purportedly resigned as D1's director.

**[7]** Plaintiff's notice of demand dated 16 October 2000 ('the notice of demand') was sent by way of AR registered post to D5 at 539–B, Taman Melaka Raya, 75000 Melaka ('the Melaka Raya address') and also at the Jalan Ong Kim Wee address.

**[8]** D5 had vide letter dated 8 November 2000 informed the plaintiff that he had resigned as D1's director and requested that he be released as a guarantor.

**[9]** On 26 January 2001, the plaintiff sent a writ and statement of claim ('the writ') to D5 at the Jalan Ong Kim Wee address by AR registered post and the AR card had been duly endorsed with that address.

**[10]** Against D5 who had not entered appearance, the plaintiff had on 9 May 2001 obtained judgment in default thereof.

NOTICE OF DEMAND

**[11]** D5's learned counsel Mr Moi Teik Seng submitted that the notice of demand had never been served on D5 and so the writ was premature, on the basis of *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 (CA).

**[12]** Learned counsel Miss Mariah Madiah contended for the plaintiff that in the guarantee, D5 has given the Melaka Raya address as the address for service to which the notice of demand had been sent. Reference was made to *Teck Guan Trading Sdn Bhd v Hydrotek Engineering (S) Sdn Bhd & Ors* [1996] 4 MLJ 331 (HC).

**[13]** I shall start with an analysis of the authority cited for D5.

**[14]** In *Soon Peng Yam*, the plaintiff's notice of demand was served in 1989 when the writ was issued in 1988 in respect of a claim based on a guarantee in which liability arose only upon a demand being made. The Court of Appeal through the judgment of Alauddin JCA (now FCJ) held that the notice of demand was a pre-requisite for the institution of the claim based on a demand guarantee and so the plaintiff had not made out a case against the guarantors.

**[15]** It is to be noted that the facts in *Soon Peng Yam* are entirely different from those in this appeal, and so I am of the view that it does not render any support to D5.

**[16]** In my judgment, I find that the contention presented for the plaintiff reflects the true position. The guarantee expressly stated in s 2 of the First Schedule thereto that D5's address for service is the Melaka Raya address.

**[17]** In addition, D5 has expressly agreed vide clause 22.1 of the guarantee, where relevant, as follows:

> 22.1Any demand or notice for payment or any other demand or notice under this Guarantee … may be made by you and by any person … for the time being acting on your behalf as your solicitor(s) by letter addressed to me … and … sent by post … to my address set forth in Section 2 of the First Schedule … shall be deemed, notwithstanding anything herein contained to the contrary, to be duly served when it ought, in due course of post or transmission, to have been delivered … .

**[18]** Clause 22.1 is self-explanatory. The notice of demand sent by the plaintiff to D5's Melaka Raya address is consistent with the address expressly stated in s 2 of the First Schedule to the guarantee, in which case the notice of demand shall be deemed, notwithstanding anything to the contrary, to be duly served when it ought, in due course of post or transmission, to have been delivered to D5.

**[19]** An almost identical clause came up for consideration in *Teck Guan Trading*, where clause 10 of the guarantee executed by the second and third defendants there reads as follows :

> Any notice or demand made by you hereunder may be served on … us personally or sent to … us by post to our address stated overleaf or … our last known address and if sent by post shall be conclusively deemed to have been received by … us within 48 hours after the time of posting despite evidence to the contrary.

**[20]** Although letters of demand were sent to the guarantors at PO Box 12200 Kota Kinabalu which was not their express address, Ian Chin J held that clause 10 made it clear that the receipt of the demand is deemed to have taken place notwithstanding that the guarantors may not have received them, as the plaintiff could choose between sending to the specific address mentioned in the guarantee or to the guarantors' 'last known address'.

**[21]** I agree with the view of the learned judge. In the instant case, a *fortiori*, since the notice of demand has been sent by way of AR registered post to D5 at the address given by D5 in the guarantee, I am unable to sustain the above submission presented for D5.

WRIT

**[22]** It was argued for D5 that the writ had also not been served on D5 as he had never acknowledged on the AR card, citing *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 (HC); *Kwong Yik Bank Bhd v Serlow Travels Sdn Bhd* [2000] 4 MLJ 595 (HC); and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 (CA).

**[23]** The plaintiff's response is that the writ had been sent by AR registered post to D5's Jalan Ong Kim Wee address which was the last known business address of D5 in accordance with clause 22.2 of the guarantee and the AR card had been duly acknowledged and returned to the plaintiff. *Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor* [2003] 3 MLJ 67 HC was relied on.

**[24]** The answer to the above submission is to be found in cl 22.2 to which D5 has expressly agreed, where relevant, in the following words:

> Unless you shall have received from me … notice in writing of a change of … last known place of business …, any Writ of Summons issued by you in any Court of competent jurisdiction in Malaysia against me …. may be served by you on me … by post to my … address … and such service shall be deemed to be sufficient and proper notwithstanding any evidence to the contrary.

**[25]** The Jalan Ong Kim Wee address is indeed the business address of D1 of which D5 was at all material time a director and D5 has not given any notice in writing of a change of his last known business address. In the circumstances, service of the writ at the Jalan Ong Kim Wee address is well within the ambit of clause 22.2.

**[26]** In this regard, O 10 r 1(1) of the RHC 1980 and s 12 of the Interpretation Acts of 1948 and 1967 are applicable.

The relevant portion of O 10 r 1(1) reads:

> Subject to the provisions of any written law and these rules, a writ must be served by sending it by prepaid registered post addressed to his last known address … .

**[27]** Section 12 provides that where a written law authorised postal service, then until the contrary is proved, service shall be presumed to have been effected when the letter (I would add in this context, the writ) would have been delivered, in the ordinary course of the post.

**[28]** In my view, the plaintiff's service of the writ by sending it to the Jalan Ong Kim Wee address as the last known business address of D5 has sufficiently fulfilled the prescribed mode of service under O 10 r 1(1) read together with s 12.

**[29]** Order 10 r 1(1) and s 12 were considered in *Pengkalen Concrete*. There, writs were sent to the guarantors' correct addresses but the returned AR card bore the name 'Yanti' which was not the name of the guarantors. Suriyadi J invoked O 10 r 1(1) and s 12, above, and held the plaintiff had done everything necessary to effect service by using the post office. (See also *Hii King Chiong & Ors v Hii Yii Ann* [1996] MLJU 450, per Elizabeth Chapman JC, as she then was).

**[30]** Notwithstanding the above, in deference to the efforts of D5's learned counsel, I shall now consider whether the authorities cited for D5 are of any assistance to D5.

**[31]** In *MBf Finance*, the AR card for the service of the letter of demand on the second defendant had not been exhibited in the affidavit in support. Inthe circumstances, Abdul Malek J (now PCA) held that the second defendant had not been served and his appeal was allowed.

**[32]** By contrast, in the appeal before me, the AR card has been exhibited in the plaintiff's affidavit in support.

**[33]** The defence contention in *Kwong Yik Bank*, that a copy of the summons in chambers had not been served on the defendant was not upheld by Kamalanathan Ratnam J (as he then was) who held that the summons had been sent by post to the defendant's last known address.

**[34]** In my view, D5's reliance on *Kwong Yik Bank*, is misconceived as it militates against the contention for D5.

**[35]** In *Ng Hee Thoong*, the guarantees in question gave the defendants' addresses as 83, Jalan Sultan Iskandar Ipoh but the notices of demand were addressed to two entirely different addresses, which were not their last known business address. Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal held that there were plainly triable issues in relation to the service of the notices of demand, and so summary judgment was set aside.

**[36]** I am unable to see any similarity between the facts in *Ng Hee Thoong* and the facts in the appeal before me.

A RESIGNATION AS DIRECTOR

**[37]** It was argued for D5 that his letter of resignation dated 8 November 2000 containing his Singapore address constituted not only a notice to the plaintiff of D5's change of address but also his release from any liability under the guarantee, in which case, it was said that the plaintiff was estopped from denying D5's change of address, on the authority of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331 FC.

**[38]** In response, it was the plaintiff's contention that D5's letter of resignation merely asked for his release as a guarantor and has never referred to any change of his address.

**[39]** After giving D5's letter of resignation my anxious consideration, it is my finding that he has used a Singapore address and stated, *inter alia*, that he has 'remained a Director of the Company at the request of Dato Eric Tan'. Further D1's letter dated 3 November 2000 and signed by 'Dato Dr Eric Tan Eng Huat' confirmed that D5 had 'remained a Director of the Company'. There is no mention of any change of his address to Singapore.

**[40]** In my view, that letter does not constitute a notice of change of address nor does it release him from his liability as a guarantor, even assuming that he had already resigned as D1's director, but the true position is that he had remained as a director of D1.

**[41]** By no stretch of imagination can the doctrine of estoppel enunciated by Gopal Sri Ram JCA for the Federal Court in *Boustead Trading*, be extended to assist D5 on the basis of the facts in this appeal.

F MERITS OF DEFENCE CASE

**[42]** D5 said that the plaintiffs claim for RM5,633,483.14 together with interest is legally invalid and that he has a defence on merits, on the basis of *Fira Development Sdn Bhd v Goldwin Sdn Bhd* [1989] 1 MLJ 40 SC.

**[43]** The plaintiff took the stand that ever since the notice of demand was sent to D5, there had never been any objection or dispute by him.

**[44]** The Supreme Court through the judgment of Lee Hun Hoe CJ (Borneo) (as he then was) held that in dealing with an application to set aside a judgment in default of appearance, the first instance judge would have to consider the merits.

**[45]** In line with the Supreme Court decision, I shall now consider the merits of D5's case.

**[46]** It is pertinent to point out that D5 has expressly agreed to clause 8.3 of the guarantee in which the relevant portion reads:

> 8 This Guarantee … shall be without prejudice to and shall not be affected nor shall I … be released or exonerated by…

8.3 any variation … indulgence … of any terms and conditions of the Loan Documents;

whether with or without my … consent or notice… .

**[47]** In addition, under cl 1.1 of the guarantee, D5 has also agreed to pay all money or liability payable and remaining unpaid to the plaintiff by the borrower Dl under and pursuant to the loan document.

**[48]** The judgment which has been obtained against D1 as the borrower provides the short answer to D5's contention as that judgment puts beyond dispute the sum and the interest payable and remaining unpaid by D1, for which D5 is liable under the guarantee.

**[49]** Hence, upon a true construction of the above clauses, I am unable to see any merit in D5's contention.

CONCLUSION

**[50]** On the foregoing grounds, I hold that the learned registrar's decision is correct which I hereby affirm. Hence, this appeal is dismissed with costs.

*Appeal dismissed with costs.*

Reported by Loo Lai Mee